Supreme Court, U.S.
FILED
05-973 JAN 31 2006
OFFICE OF THE CLERK

No. _____

In The
Supreme Court of the United States

ROBERT G. WARNOCK,

Petitioner

v.

NATIONAL FOOTBALL LEAGUE, ET AL.,

Respondent

On Petition For Writ Of Certiorari
To The Third Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does Petitioner Robert G. Warnock, a municipal taxpayer of Allegheny County Pennsylvania, purporting to sue in the United States District Court for the Western District of Pennsylvania "[o]n behalf of Allegheny County," have standing to assert an antitrust claim against Appellees, The National Football League and its member Franchises when a similar municipal taxpayer in Hamilton County, Ohio, purporting to sue "[o]n behalf of Hamilton County, Ohio," has standing to assert an antitrust claim against Appellees, The National Football League and its member Franchises in the identical antitrust action in the United States District Court for the Southern District of Ohio.

Answered in the negative by the District Court.

Answered in the negative by the Third Circuit Court of Appeals.

PARTIES TO THE PROCEEDING

Petitioner is Robert G. Warnock (hereinafter referred to as Warnock), a municipal taxpayer residing in the City of Pittsburgh, County of Allegheny and Commonwealth of Pennsylvania.

Defendants are the National Football League (hereinafter referred to as NFL) and member Franchises-- Arizona Cardinals Inc., d/b/a Arizona Cardinals; Atlanta Falcons Football Club LLC, d/b/a Atlanta Falcons; Baltimore Ravens Limited Partnership, d/b/a Baltimore Ravens; Buffalo Bills Inc, d/b/a Buffalo Bills; Chicago Bears Football Club Inc., d/b/a Chicago Bears; Pittsburgh Steelers Inc., d/b/a Pittsburgh Steelers LLC; Cleveland Browns LLC, d/b/a Cleveland Browns; Dallas Cowboys Football Club Ltd, d/b/a Dallas Cowboys; Denver Broncos Football Club, d/b/a Denver Broncos; Detroit Lions, Inc., d/b/a Detroit Lions; Green Bay Packers Inc., d/b/a Green Bay Packers; Houston NFL holdings LP, d/b/a Houston Texans; Indianapolis Colts; Jacksonville Jaguars Ltd., d/b/a Jacksonville Jaguars; Kansas City Chiefs Football Club Inc., d/b/a Kansas City Chiefs; Miami Dolphins; Minnesota Vikings Football Club LLC, d/b/a Minnesota Vikings; New England Patriots; New Orleans Saints LP, d/b/a New Orleans Saints; New York Football Giants, d/b/a New York Giants; New York Jets Football Club Inc., d/b/a New York Jets; Oakland Raiders LP, d/b/a Oakland Raiders; Panthers Football LLC, d/b/a Carolina Panthers; Philadelphia Eagles; Pittsburgh Steelers Sports, Inc., d/b/a Pittsburgh Steelers; San Diego Chargers Football Co., d/b/a San Diego Chargers; San Francisco 49ers Ltd., d/b/a San Francisco 49ers; Seattle Seahawks Inc., d/b/a Seattle Seahawks; St Louis Rams Football Co., St Louis Rams; Tampa Bay Buccaneers; Tennessee Titans LLP, d/b/a Tennessee Titans; Washington Football Inc., d/b/a Washington Redskins.

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IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT G. WARNOCK,

Petitioner

v.

NATIONAL FOOTBALL LEAGUE ET AL.,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on November 9, 2005.

OPINION BELOW

The opinion of the Court of Appeals, reported at Warnock v. NFL, 2005 U.S. App. LEXIS 24167 appears in the appendix

JURISDICTION

The judgment of the court of appeals for the Third Circuit was entered on November 9, 2005. No Petition for Rehearing was filed and the Petition for certiorari was filed within 90 days of that date. This court's jurisdiction

is invoked pursuant to 28 USCS § 1254 which provides as follows:

STATUTORY PROVISION INVOLVED

This action arises under 28 U.S.C. §1331 (federal question jurisdiction):

> § 1331. Federal question
>
> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

15 U.S.C. § 1(Sherman Antitrust Act):

> § 1. Trusts, etc., in restraint of trade illegal; penalty
>
> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $ 100,000,000 if a corporation, or, if any other person, $ 1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

15 U.S.C. §15 (Clayton Act).

> §15. Suits by persons injured

(a) Amount of recovery; prejudgment interest. Except as provided in subsection (b), any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. ...

DATE OF JUDGMENT SOUGHT TO BE REVIEWED

Review of the Judgment of the United States Court of Appeals for the Third Circuit dated November 9, 2005 which affirmed the Order of the United States District Court for the Western District of Pennsylvania dismissing the Antitrust Complaint filed in this case. No motion for rehearing was filed in the Court of Appeals.

STATEMENT OF THE CASE

Two sports stadia, Heinz Field and Paul Brown Stadium, are on the Ohio River; Heinz Field is situate at the confluence of the Monongahela and Allegheny Rivers--the headwaters of the Ohio; the navigable distance between the two stadia is 471 miles;[1] the driving distance between the two cities is 283.93 miles.[2] The point at Pittsburgh is mile Zero—the headwaters of the Ohio River.

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[1] Source—Army Corp of Engineers, Louisville District, Ohio River Navigation Chart.

[2] Source–Mapquest.com

Petitioner is Robert G. Warnock (hereinafter referred to as Warnock), a municipal taxpayer residing in the City of Pittsburgh, County of Allegheny and Commonwealth of Pennsylvania. Defendants are the National Football League (hereinafter referred to as NFL) and member Franchises.

The opinion of the United States District Court for the Western District of Pennsylvania is found at *Warnock v. NFL*, 356 F. Supp. 2d 535 (W.D. Pa. 2005.) The opinion of United States Third Circuit Court of Appeals is found at 2005 U.S. App. LEXIS 24167

In Cincinnati, the United States District Court for the Southern District of Ohio is presiding over an antitrust case filed by a municipal taxpayer "on behalf of the County of Hamilton, State of Ohio" and is proceeding to trial; in Pittsburgh, in a case identical in all respects to the Ohio case save the name of the stadium and patterned after the case in Ohio, involving the same Defendants, alleging the same conduct, raising the same issues, and brought similarly by a municipal taxpayer, the United States District Court for the Western District of Pennsylvania, dismissed the case based on the identical Motion to Dismiss filed in Cincinnati. A panel of the Third Circuit Court of Appeals sitting in Philadelphia affirmed the District Court.

The Sixth Circuit Court of Appeals was presented an opportunity to preliminarily rule on the issue of municipal taxpayer standing via the NFL's Motion for Writ of Mandamus, an opportunity which was declined by the Sixth Circuit. The Sixth Circuit Court of Appeals denied the motion and the case is proceeding in Cincinnati.[3]

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[3] *In Re: National Football League; et al.*, Petitioners at No. 04-3919

For the past decade, American communities have spent billions of dollars to attract or retain NFL franchises. By contract—specifically, the NFL Constitution and Bylaws among league owners and the collective bargaining agreement between owners and players—NFL owners share most revenues with each other and with players through revenue-sharing formulas. With these agreements limiting their profits, NFL owners have exploited the league's monopoly power to increase their personal profits through stadium deals generating revenues that, by and large, owners keep for themselves.

NFL owners have structured the league to create an excess demand for teams among cities across the country. Owners keep league membership substantially lower than the number of cities or markets that can support an NFL franchise. By creating a system in which many cities that are viable franchise sites do not have teams, NFL owners have enormous leverage through competitive bidding for any franchise that becomes available, whether by expansion or relocation. As a consequence, just as NFL player salaries skyrocketed through player free agency, taxpayer subsidies for stadium construction skyrocketed because of "franchise free agency." This skyrocketing of taxpayer subsidies is in the face of skyrocketing franchise values: e.g., the Pittsburgh Steelers franchise increased from $325 million the year before Heinz Field opened to $525 million the year the stadium opened, and $825 million in the most recent year.[4]

Beginning in 1996 to the present, the NFL

(6th Cir. 2004)

[4] Source: Forbes.com annual review of NFL franchise values.

conspired with the Pittsburgh Steelers to convince the Sports & Exhibition Authority to construct football-only stadium known as Heinz Field. NFL franchises, like the Pittsburgh Steelers, misled their host communities by arguing that existing stadiums were "economically obsolete" when, in fact, teams could have paid for players under the 1993 collective bargaining agreement while staying profitable. NFL teams, including the Steelers, have also unlawfully restricted competition under the antitrust laws by requiring that their stadium leases prohibit any other professional football team from using these stadiums, and has committed antitrust violations by adopting rules against public ownership to ensure that existing NFL owners have absolute control over team placement and movement. Although the NFL adopted rules specifically to prevent antitrust violations, the league has permitted teams, including the Pittsburgh Steelers, to disregard these rules.

The citizens of Allegheny County were willing to build a new stadium for the Pittsburgh Steelers and agree to lease terms that allowed the franchise to field a competitive team while remaining profitable. Allegheny County residents never intended, however, to spend tax dollars merely to increase the Steelers' profits or to increase the franchise's value. Yet, the cumulative effect of the NFL's antitrust violations forced Allegheny County to pay money far more to build Heinz Field and to agree to more onerous lease terms to keep the Steelers in Pittsburgh than a marketplace free of these trade restraints would have demanded. Execution of the lease required consent by the National Football League. Hence this action.

Robert G. Warnock, (hereinafter referred to as "Warnock") filed an antitrust complaint against the National Football League (hereinafter referred to at the "NFL") and its member franchises to redress claims of

antitrust violations in procuring public stadium financing for the Pittsburgh Steelers Sports, Inc. Specifically, Warnock averred that The NFL and its member teams, including the Pittsburgh Steelers, have violated the Sherman Antitrust Act (15 U.S.C. §1-2), which the Clayton Act (15 U.S.C. §15) Warnock filed the action behalf of Allegheny County.

The NFL moved to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Defendants National Footbal' League, Pittsburgh Steelers Sports, Inc., and Philadelphia Eagles Limited Partnership moved to dismiss Plaintiffs complaint averring Warnock's claim for treble damages under the federal antitrust laws is asserted not on his own behalf, but "on behalf of Allegheny County" (Compl. at ¶ 58), Appellees asserted that Plaintiff lacks standing, under both Article III of the United States Constitution and under the heightened standing requirements of the federal antitrust laws, to bring such an action.

The matter was briefed and the District Court heard oral argument on October 8, 2005. The Lower Court filed a Memorandum Order on February 9, 2005 and order of dismissal. Timely Notice of Appeal to the United States Court of Appeals for the Third Circuit was filed on February 15, 2005. The matter was briefed and set for disposition by the Third Circuit Court. On November 9, 2005, the United States Court of Appeals For The Third Circuit at Docket Number 05-1530 filed an opinion and affirmed the District Court, hence this Petition for Certiorari.

REASONS FOR GRANTING THE WRIT

THE DECISION IN THE THIRD CIRCUIT COURT OF APPEALS IS IN DIRECT CONFLICT WITH THE DECISION IN AN IDENTICAL CASE IN THE SIXTH CIRCUIT COURT OF APPEALS

Supreme Court Rule 10 states that a petition for a writ of certiorari will be granted when United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter. That is precisely the situation in this case. In the instant case, the Third Circuit decision is in direct conflict with the decision of the Sixth Circuit in a case that is identical with the exception of the particular stadium and taxing authority in which the municipal taxpayer claiming standing resides. The facts, law, and policy in both cases are identical. The Defendants are identical. The municipal taxpayer claiming standing, the stadium financed, and the municipal taxing authority are different. The motion filed by the NFL in both cases is identical as is the legal theory that forms the basis of the motion.

Robert G. Warnock's complaint contains averments of facts that are sufficient to support antitrust standing. These facts must be assumed as true for purposes of the Motion to Dismiss. There is a causal connection between the antitrust violation—the NFL's conspiracy and the harm to the Plaintiff. There is no doubt that the Plaintiff's injury is of the type for which the antitrust laws were intended to provide redress. Robert G. Warnock has averred facts which taken as true, as the court must, establish the directness of the injury, and address the concerns that too liberal an application of standing principles might produce speculative claims.

Appellees, relying upon the fact that the County of Allegheny and the Sports & Exhibition Authority will not intervene in this action due to an Unholy Alliance of the principals of the NFL, Pittsburgh Steelers Sports, Inc., and the County of Allegheny and the Sports & Exhibition Authority, would limit standing to the County and Authority. The politicians are unwilling to disturb the status quo that was created under their watch and that of their predecessors. An unholy alliance has been formed between the NFL and the local politicians.

MUNICIPAL TAXPAYER STANDING

Warnock's status as a taxpayer of the County of Allegheny accords him sufficient standing to pursue the within action. In his Complaint, Warnock unambiguously alleges that taxpayer funds raised by the Regional Asset District Tax were used to fund the stadium construction and provide for maintenance of the stadium into the future. He also clearly avers to being a county taxpayer.

In the seminal Supreme Court case of *Frothingham v. Mellon*, 262 U.S. 447 (1923), the Supreme Court concluded that "the relation of a taxpayer for the United States to the federal government" did not provide for standing to contest federal government expenditures. Id. 262 U.S. at 487. The *Frothingham* case distinguished federal and municipal taxpayers for purposes of standing. The Court found that municipal taxpayers do enjoy Article III standing to bring at least some types of suits in federal court contesting the municipality's expenditures and/or taxation efforts.

In *Flast v. Cohen*, 392 U.S. 83 (1968), the Supreme Court explicitly "conferred [standing] on municipal taxpayers to sue in that capacity." *Flast*, 392 U.S. at 93. This distinction is based upon the fact that "the interest

of a federal taxpayer in total federal tax revenues [were] comparatively minute and indeterminable when measured against a municipal taxpayer's interest in a smaller city treasury." Id., 392 U.S. at 93, quoting in part *Frothingham*, 262 U.S. at 486.

This Court has indicated that the *Frothingham* principle has been left undisturbed by its subsequent decisions regarding standing. *e.g., Valley Forge*, 454 U.S. at 481; *U.S. v. Richardson*, 418 U.S. 166, 171 (1974). Many of these principles are laid out in a case in the Southern District of Ohio which deals with a municipal taxpayer antitrust claim against the NFL with regard to public financing of Paul Brown Stadium.[5]

The Third Circuit accepted and applied this principle, affirming the standing of municipal taxpayers to sue in federal court on this basis alone. See *Rocks v. Philadelphia*, 868 F.2d 644, (3d Cir. 1989). The appellate court concluded, without substantial discussion, that a municipal taxpayer enjoyed standing to challenge a state statute as violative of state and federal law in federal court. Id. 868 F.2d 644

The circuit court declined to find standing, basing its decision on the directness of the injury. The Sixth Circuit in the Ohio case refused to grant the mandamus in the face of the district court's finding of a sufficient nexus.

In *United States v. City of New York*, 972 F.2d 464 (2d Cir. 1992) the Second Circuit noted that "[o]ther courts of appeals to consider the question have uniformly

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[5] State of Ohio ex rel. Carrie Davis v. National Football League, et al., No. 1:03-CV-00355, Opinion of U.S. District Judge Arthur Spiegel. February 9, 2004.

concluded that municipal taxpayers have standing to challenge allegedly unlawful municipal expenditures." Id., 972 F.2d at 471 (citing numerous cases) .

Robert G. Warnock has standing on the basis that "(1) he pays taxes to the relevant entity, and (2) tax revenues are expended on the disputed practice.")"[6]

> The Supreme Court recognized in *Doremus v. Board of Education of Hawthorne*, 342 U.S. 429, 434, (1952), that a municipal taxpayer may possess standing to litigate "a good-faith pocketbook action." See also *Doe v. Beaumont Indep. Sch. Dist.*, 173 F.3d 274, 282 (5th Cir. 1999) ("... To establish . . . municipal taxpayer standing . . . a Plaintiff must show only that (1) he pays taxes to the relevant entity, and (2) tax revenues are expended on the disputed practice."); *Clay v. Fort Wayne Community Sch.*, 76 F.3d 873, 879 (7th Cir. 1996) (acknowledging the good-faith pocketbook requirement adopted by Doremus for municipal taxpayer standing); *United States v. New York*, 972 F.2d 464, 470 (2d Cir. 1992) ("Municipal taxpayers have standing to challenge allegedly unlawful municipal expenditures.") (collecting cases); *Cammack v. Waihee*, 932 F.2d 765, 770 (9th Cir. 1991) ("The Doremus requirement [**8] of a pocketbook injury applies to municipal taxpayer standing . . . .") (collecting cases); *District of Columbia Common Cause v. District of Columbia*, 858 F.2d 1, 4 (D.C. Cir. 1988) (same). n1

ACLU-NJ v. Wall ACLU-NJ, 246 F.3d 258, 262, (3d Cir. 2001).

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[6] ACLU-NJ v. Wall ACLU-NJ, 246 F.3d 258 (3d Cir. 2001)

It is submitted that this Court should have little difficulty concluding that Warnock has averred sufficient facts to endow him with taxpayer standing to advance the instant suit—facts which for purposes of the resolution of this motion, must be accepted as true. Robert G. Warnock in paragraph 54 through 57 of the complaint alleges that"

> 54. The lease for Heinz Field was authorized by the Sports & Exhibition Authority on May 10, 2000. The lease executed by the Steelers give nearly all the new revenue from the stadiums to the teams, reserving a trickle of dollars for the sports authority. Meanwhile, the leases put the authority, a city-county agency, on the hook for major repair and improvement expenses over the 30-year life of the agreements. The Sports & Exhibition Authority -- and by extension, city and county taxpayers -- will be responsible for capital repairs and improvements at both new stadiums. ... The authority must set up capital improvement funds for Heinz Field, depositing $3 million initially and adding $650,000 to the fund every year. ...[7]
>
> 55. The Steelers pay no base rent in their lease. They had agreed to pay $250,000 per year, but at the sports authority's request, made a $2.5 million lump sum payment toward stadium construction costs instead. The Steelers also are imposing a 5 percent ticket surcharge. The first $1.4 million brought in goes

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[7] Schmidtz, Jon. "Leases Look Good For Teams, But Taxpayers Should Beware" *Pittsburgh Post-Gazette*. May 21, 2000.

toward the team's share of stadium construction financing. Any excess goes to the sports authority for the capital reserve fund. ... [8]

56. Starting in 2017, if the National Football League allows it, the Steelers will put an estimated $2.9 million a year into the capital reserve fund from the visiting teams' share of club seat revenue. (For the first 15 years of the lease, that income goes to pay off construction bonds.) [9]

57. The Steelers' agreement provides no guarantee that the authority will get sufficient revenue to meet its $650,000 annual obligation to the reserve fund.[10]

Indeed, the District Court, under the standard of review, assumed that Warnock alleged a sufficient injury:

> ...i.e., that plaintiffs tax dollars were improperly expended on the disputed practice. See *Rocks*, 868 F.2d at 648 (determining without discussion municipal taxpayers suffered a sufficient injury under Article III); *see also United States v. New York*, 972 F.2d 464, 470 (2d Cir. 1992) ("we presume a municipal taxpayer's relationship to the municipality is 'direct and immediate' such that the taxpayer suffers concrete injury whenever the 'challenged activity involves a

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[8] Schmidtz, Jon. "Leases Look Good For Teams, But Taxpayers Should Beware" *Pittsburgh Post-Gazette*. May 21, 2000.

[9] Schmidtz, Jon. "Leases Look Good For Teams, But Taxpayers Should Beware" *Pittsburgh Post-Gazette*. May 21, 2000.

[10] Schmidtz, Jon. "Leases Look Good For Teams, But Taxpayers Should Beware" *Pittsburgh Post-Gazette*. May 21, 2000.

measurable appropriation or loss of revenue."); *Cammack v. Waihee*, 932 F.2d 765, 770-71 (9th Cir. 1991) ("municipal taxpayer standing simply requires the 'injury' of an allegedly improper expenditure of municipal funds"); *District of Columbia Common Cause v. District of Columbia*, 858 F.2d 1, 5 (D.C. Cir. 1988) ("[w]hen a municipal taxpayer can establish that the challenged activity involves a measurable appropriation or loss of revenue, the injury requirement is satisfied."). The court also accepts for purposes of the motion to dismiss that plaintiff's injury could be redressed by a favorable decision finding that the stadium lease was voidable at Allegheny County's discretion. *Cammack*, 932 F.2d at 772 (injunction ceasing government's expenditure on disputed practice sufficient to redress plaintiffs injury). Plaintiff does not have to demonstrate that his taxes will be reduced as a result of a favorable judgment. See *District of Columbia Common Cause*, 858 F.2d at 5 ("[b]y enjoining an illegal expenditure, the court can redress the taxpayer's injury caused by the misuse of public funds and ensure that the funds will be devoted to lawful purposes of possible benefit to the taxpayers.").[11]

The NFL argued to the District Court that Municipal Taxpayer Standing is limited to cases involving unconstitutional violation claims. The District Court, however, in footnote 3 to its opinion, discussed the proposition and stated that it declined to find such a limit.

...The court, however, declines to add th.

[11] District Court Memorandum Opinion. Appendix. page 21.

> element to municipal taxpayer standing at this time, especially since the suit in *Crampton* did not involve a constitutional challenge to the municipality's actions. *Crampton*, 101 U.S. at 608.[12]

The District Court, however, determined that it "cannot find that plaintiff's injury is "fairly traceable to the conduct" of defendants. *Allen v. Wright*, 468 U.S. 737, 757 (1984).[13]"

> [P]laintiff's theory is missing a critical link in the chain of causation. ... While the standing doctrine may be an elastic concept, extending the doctrine to fit plaintiff's theory would stretch standing beyond the breaking point.[14]

However, significantly, this determination is based on the "flood-gates argument"

> If plaintiff's theory was accepted by this court, any municipal taxpayer could bring suit against any private entity that receives tax dollars from a local government by arguing that the entity violated federal law. Federal courts could be flooded with a litany of claims by municipal taxpayers seeking to sue private entities as long as the litigant could successfully allege a nexus between a violation of federal law

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[12] District Court Memorandum Opinion, Appendix page 21.

[13] District Court Memorandum Opinion, Appendix page 22.

[14] District Court Memorandum Opinion, Appendix page 22.

and the entity's receipt of municipal tax dollars.[15]

This is not a sound basis for judicial determinations. The U.S. District Court for the Southern District of Ohio has taken a different view in the identical case.

> The Court is aware that this holding raises certain pragmatic concerns. It recognizes that other circuits have been less hesitant to narrow the *Frothingham* exception for municipal taxpayers. See, *e.g., Rifkin*, 248 F.3d at 632. (footnote omitted) The Court also notes that a finding of standing in the instant case could potentially open the door to a substantial amount of similar litigation in this Court. The Court, however, finds support in two general theories. First, the Court has an obligation to demonstrate restraint in dismissing antitrust actions where the pleadings satisfy the requirements of the statute. See *Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc.*, 394 U.S. 704, 709 (1969)
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> ... For example, the Supreme Court explicitly acknowledged that affording taxpayers standing would potentially subject every "appropriation act and statute whose administration requires the outlay of public money" to review if its "validity may be questioned," but nonetheless sustained the rights of municipal taxpayers to bring such suits. *Frothingham*, 262 U.S. at 487; see also *Flast*, 392 U.S. at 92. Similarly, the Supreme Court recognized that "allowing class actions to be brought by retail consumers" under the federal antitrust laws "may well...add a significant burden to the already crowded

[15] District Court Memorandum Opinion, Appendix page 22.

> dockets of the federal courts." *Reiter*, 442 U.S. at 343-44. The unmistakable mandate of Congress to create a private remedy for "the purpose of encouraging private challenges to antitrust violations," thereby "open[ing] the door of justice to every man... [for] ample damages for the wrongs suffered" by such violations required the Court to accept this burden. Id., 442 U.S. at 343-44. This Court enjoys a similar mandate; it finds, based solely on an evaluation of the Complaint, that Davis enjoys standing to bring the instant suit. The moving Defendants' motion will be denied as to this ground.

Accordingly, this Court should find that Robert G. Warnock alleges a direct, measurable appropriation of the municipality that dramatically affects the public fisc, establishing a "good-faith pocketbook injury" sufficient to provide standing.

In the Southern District of Ohio case, Judge Spiegel determined that "the antitrust claims she [Carrie Davis] raises arise out of the very financial injury that she suffers as a taxpayer and for which she enjoys federal standing. Allowing Davis to prosecute the instant suit "is necessary to insure protection of the rights" she asserts."

Robert G. Warnock would submit that this Court should have little difficulty in finding it well beyond "pure speculation" that the lawsuit would result in tax relief or recovery for Robert G. Warnock and Allegheny County *ASARCO*, 490 U.S. at 614; see also *Valley Forge*, 454 U.S. at 472; *Frothingham*, 262 U.S. at 487. The Regional Asset District Tax and expenditures are directly and inextricably related; success on the claims raised in this suit would inevitably influence the distribution of the tax. At the very least, the continuing violations resulting from the alleged wrongdoings would cease. This Court should

find that Robert G. Warnock enjoys taxpayer standing to bring the instant suit.

ANTITRUST STANDING

> Although the constellation of standing is firmly fixed in the heavens of federal jurisprudence, its contours are necessarily shaped by the types of claims a Plaintiff advances *e.g., Raines v. Byrd,* 521 U.S. 811, 818 (1997); *Warth v. Seldin,* 422 U.S. 490, 500 (1975) (holding that the determination of whether a particular Plaintiff is the proper party to bring the suit "often turns on the nature and source of the claim asserted").[16]

The Third Circuit in the case of *2660 Woodley Rd. Joint Venture v. ITT Sheraton,* 369 F.3d 732, stated in a private suit brought pursuant to the Sherman and Clayton Acts, the Plaintiff must allege, and ultimately demonstrate "(1) the causal connection between the antitrust violation and the harm to the Plaintiff and the intent by the Defendant to cause that harm, with neither factor alone conferring standing; (2) whether the Plaintiff's alleged injury is of the type for which the antitrust laws were intended to provide redress; (3) the directness of [*18] the injury, which addressed the concerns that liberal application of standing principles might produce speculative claims; (4) the existence of more direct victims of the alleged antitrust violations; and (5) the potential for duplicative recovery or complex apportionment of damages." (369 F.3d 732, at 740 & 741)

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[16] State of Ohio ex rel. Carrie Davis v. National Football League, et al., No. 1:03-CV-00355. Opinion of U.S. District Judge Arthur Spiegel. February 9, 2004.

The National Football League argued in the District Court that the claim asserted by Plaintiff could best be pursued, if at all, by Allegheny County, whom Plaintiff purports to represent, or the Sports & Exhibition Authority, which authorized the lease for Heinz Field. This challenge to Warnock's standing made with the confidence that the County of Allegheny and the Sports & Exhibition Authority will not intervene in this action due to an Unholy Alliance of the principals of the NFL, Pittsburgh Steelers Sports, Inc., and the County of Allegheny and the Sports & Exhibition Authority. The politicians are unwilling to disturb the status quo which was created under their watch or that of their predecessor. This is an alliance which this court can break by granting standing.

The District Court citing *Lower Lake Erie Iron Ore Antitrust Lit.*, 998 F.2d 1144, 1165-66 (3d Cir. 1993) (...). Stated: "In this case, plaintiff has not alleged any facts that his "business or property" was injured as a result of a violation of antitrust laws. ..., he does not allege any other connection with defendants other than the fact that he pays taxes to Allegheny County which entered into a lease relationship with defendants."[17]

The District Court focused on the fact that the County of Allegheny close not to join in the action and limited the victim to the County: "Allegheny County is the entity that has allegedly been injured by defendants' conduct, and the county could possibly (although it chose not to join plaintiff's case) bring suit against defendants as well"[18] The District Court then determined that Warnock did not satisfy prudential standing standards.

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[17] Memorandum Order footnote 7. Appendix page 23

[18] Memorandum Order footnote 7. Appendix page 23

It is submitted that this is a narrow reading of the case law and frustrates the intent of the statute. The district court's determination is essentially that Allegheny County is, a more direct victim, and therefore, the action may not go forward absent the County's participation.

Warnock's complaint avers facts which establish antitrust standing, facts which at this stage must be assumed as true. There is a causal connection between the antitrust violation—the NFL's conspiracy and the harm to the Plaintiff.[19] There is no doubt that the Plaintiff's alleged injury is of the type for which the antitrust laws were intended to provide redress. Warnock as averred facts which establish the directness of the injury, and address the concerns that liberal application of standing principles might produce speculative claims.

Plaintiff seeks to assert his interest in the County of Allegheny fisc--an interest which is his by virtue of his county taxpayer status. The fact that there may be numerous individuals with standing to bring a particular action does not mean that the individual who brings the action is barred as being based upon "...a "generalized grievance" shared by all Allegheny County taxpayers."

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[19] 64 The citizens of Allegheny County were willing to build a new stadium for the Pittsburgh Steelers and agree to lease terms that allowed the franchise to field a competitive team white remaining profitable. Allegheny County residents never intended, however, to spend tax dollars merely to increase the Steelers' profits or to increase the franchise's value. Yet, the cumulative effect of the NFL's antitrust violations forced Allegheny County to pay money far more to build Heinz Field and to agree to more onerous lease terms to keep the Steelers in Pittsburgh than a marketplace free of these trade restraints would have demanded. ... (Warnock's Complaint ¶64)

Defendants would limit the universe of Plaintiffs with standing to those who are consumer or participant in the market for stadium facilities. Defendants aver that "he [Robert G. Warnock] does not, for example, own a facility capable of accommodating an NFL franchise; nor is he a prospective stadium tenant." The NFL pressed *Barton & Pittinos, Inc. v. Smithkline Beecham Corp.*, 118 F.3d 178, 184 (3d Cir. 1997) (holding, under *Associated General Contractors*, that Plaintiff lacked antitrust standing where it was neither consumer nor competitor in the relevant market.) That case is inapposite. Here the injury to the taxpayer is related to application of tax funds to a commercially unreasonable lease. Defendants refuse to recognize that the claim of Plaintiff is directly related to his status as a county resident taxpayer. He challenges the misapplication of the funds from the Regional Asset District, and the county coffers. He is directly affected by the antitrust violations perpetrated by the Defendants.

The NFL citing *Int'l Raw Materials, Ltd. v. Stauffer Chem. Co.*, 978 F.2d 1318, (3d Cir. 1992) urged the proposition of denying antitrust standing where there was a risk of duplicative recovery. Here there is no risk of duplicative recovery, and in addition, *Int'l Raw Materials* recognized that one other than a competitor or consumer in the relevant market may have standing.

Judge S. Arthur Spiegel of the Southern District of Ohio in the case of *Ohio ex rel. Carrie Davis v. National Football League, et al.*, Civ. No. 1:03-CV-00355 (S.D. Ohio

Feb. 9, 2004)[20] wherein the District Court held that the taxpayer there had "municipal taxpayer standing" to pursue a federal antitrust suit against the NFL and its member clubs with regard to the financing of Paul Brown Stadium in Cincinnati Ohio.

The NFL argued below that, "[t]here is a compelling rationale for limiting municipal taxpayer actions to suits for injunctive relief against public entities for constitutional violations. Article III's limitations on taxpayer standing are intended, in part, to prevent taxpayers from usurping traditional governmental functions, including the function of evaluating and deciding whether to initiate litigation on the government's behalf." Warnock would submit that in this case taxpayer standing is the only means to redress.

[20] *Ohio ex rel. Carrie Davis v. National Football League, et al.*, Civ. No. 1:03-CV-00355 (S.D. Ohio Feb. 9, 2004)

CONCLUSION

Taxpayer standing has been granted in the U. S. District Court for the Southern District of Ohio and that case is proceeding. Taxpayer standing has been denied in the U.S. District Court for the Western District of Pennsylvania; this clearly constitutes a conflict in the circuits which only this Honorable Court can resolve. Taxpayers in the respective states should expect and receive equal treatment; equal protection of the laws demands such. It is respectfully submitted that such a conflict should not be permitted to continue. For these reasons, the writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

NOT PRECEDENTIAL

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 05-1530

ROBERT C. WARNOCK, *Appellant*
v. NATIONAL FOOTBALL LEAGUE; ET AL.

On Appeal From the United States District Court For the Western District of Pennsylvania (D.C. No. 04-cv-00330) District Judge: Honorable Joy F. Conti Submitted Under Third Circuit LAR 34.1(a) October 21, 2005

Before: SMITH, BECKER and NYGAARD, *Circuit Judges* (Filed: November 9, 2005)

OPINION

BECKER, Circuit Judge.

Robert C. Warnock is a municipal taxpayer, residing in Pittsburgh, Pennsylvania. He alleges in his complaint that the defendants, the National Football League ("NFL") and all of its member football clubs, including the Pittsburgh Steelers, violated the Sherman Antitrust Act, 15 U.S.C.S. §§ 1-2, and the Clayton Act, 15 U.S.C.S. § 15, by acting in concert to force host cities and counties to build new football stadiums and then lease those stadiums to the clubs under favorable lease terms. Defendants filed a motion

to dismiss the complaint for lack of standing. The District Court held that Warnock was essentially bringing derivative claims on behalf of Allegheny County and the Sports and Exhibition Authority of the City of Pittsburgh and that his allegations, taken as true for purposes of the motion to dismiss, did not give rise to standing. The Court concluded that Warnock's injury was not fairly traceable to the conduct of defendants. His injury was that his tax dollars were allegedly being improperly spent on a disputed practice and yet the league and its clubs were not the entity that allegedly improperly distributed the tax dollars. Moreover, the NFL and its clubs did not have the ability to levy and collect taxes from the citizens of Allegheny County. The lawsuit thus failed for lack of constitutional standing. Additionally, the Court held that the suit also failed under the prudential limitations of the municipal taxpayer doctrine. Warnock's claim clearly did not meet the first requirement as no government entity had been sued. As to the second requirement, Warnock was suing for more than equitable relief.

We agree and affirm, essentially for the reasons set forth in Judge Conti's excellent opinion. We also note, in apparent agreement with Judge Conti, *see* 356 F. Supp.2d 535, 545 n.7 (W.D.Pa. 2005), that even if Allegheny County was a party to the lawsuit, plaintiff could not meet the more demanding requirements of antitrust standing. In assessing this issue, we use the framework established in *Associated General Contractors of California v. California State Council of Carpenters,* 459 U.S. 519 (1983), to consider several factors in an antitrust standing analysis:

> (1)the causal connection between the antitrust violation and the harm to the plaintiff and the intent by the defendant to cause that

harm, with neither factor alone conferring standing;

(2)whether the plaintiffs alleged injury is of the type for which the antitrust laws were intended to provide redress;

(3)the directness of the injury, which addressed the concerns that liberal application of standing principles might produce speculative claims;

(4)the existence of more direct victims of the alleged antitrust violations; and

(5)the potential for duplicative recovery or complex apportionment of damages.

2660 Woodley Rd. Joint Venture v. ITT Sheraton Corp., 369 F.3d 732, 740-41 (3d Cir. 2004).

As we see it, the pivotal question here is the "directness" of the victim – as opposed to the injury. We must ask whether there are "more direct victims" of the NFL's alleged violations. *Id.* at 741. It appears to us that Allegheny County and the Sports & Exhibition Authority have been more directly harmed than taxpayers like Warnock. They have allegedly been coerced to offer favorable terms to the Steelers, to the taxpayers' detriment. Therefore, taxpayers would be only indirect victims. Granted, Warnock alleges that the County and the Authority are engaged in an "unholy alliance" with the NFL. However, if that is the case, the County and the Authority would be the proper defendants, not the NFL. Indeed, the District Court properly cited Areeda & Hovenkamp, *Antitrust Law* § 335a (2d ed. 2000), for the proposition that allegations of political influence or conspiracy on the part of the government are not sufficient for standing. 356 F. Supp. at 545 n.7.

Also, one of the essential tenets of antitrust standing is that a plaintiff must generally be a "competitor or customer" of the defendant. This requirement can be fulfilled if the harm to the plaintiff is "inextricably intertwined" with the antitrust conspiracy. *See Gulfstream III Assocs., Inc. v. Gulfstream Aerospace Corp.*, 995 F.2d 425, 429 (3d Cir. 1993). Here, Warnock is clearly not a competitor. Nor is he a customer in the traditional sense. He has not alleged that he is either a prospective professional football team owner, or that he is an actual consumer of the NFL's products. Unless one concludes that Warnock's harm is "inextricably intertwined" with the alleged violation, which it is not, Warnock is simply a taxpayer with a general grievance. The judgment of the District Court will be affirmed.

On Appeal From the United States District Court
For the Western District of Pennsylvania
(D.C. No. 04-cv-00330)
District Judge: Honorable Joy F. Conti

Submitted Under Third Circuit LAR 34.1(a) October 21, 2005 Before: SMITH, BECKER and NYGAARD, *Circuit Judges*

JUDGMENT

This case came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was submitted on October 21, 2005. On consideration whereof, it is now here

ORDERED and ADJUDGED by this Court that the judgment of the District Court entered February 10, 2005 is, and the same is hereby, affirmed. All of the above in accordance with the opinion of this Court.

Costs taxed against appellant.

ATTEST:
/s/ Marcia M. Waldron
Clerk

DATED: November 9, 2005

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ROBERT C. WARNOCK, Plaintiff,

vs.

THE NATIONAL FOOTBALL LEAGUE, ET. AL.
Defendants,

Case No. 04--0330

U. S. District Court Judge Joy Flowers Conti

MEMORANDUM ORDER

CONTI, District Judge

Pending before the court is the motion by defendants National Football League and its member clubs (the "NFL"), including Pittsburgh Steelers Sports, Inc. (the "Steelers") and Philadelphia Eagles Limited Partnership (the "Eagles") (collectively referred to as "defendants"), to dismiss the complaint of plaintiff Robert C. Warnock ("plaintiff or "Warnock") for lack of standing (Doc. No. 5). Plaintiff in his complaint alleges that defendants violated the Sherman Antitrust Act, 15 U.S.C. §§ 1-2, and the Clayton Act, 15 U.S.C. § 15, by acting in concert to force NFL host cities and counties to build new football stadiums — including Pittsburgh's Heinz Field, home of the Steelers — and lease the stadiums to NFL clubs under favorable lease terms. Plaintiff alleges in particular that "by limiting the number and barring public ownership of NFL franchises, defendants forced Allegheny County to pay. . . far more to build Heinz Field and to agree to more onerous lease terms to keep the

Steelers in Pittsburgh than a marketplace free of these restraints would have demanded." Pl.'s Compl. ¶ 64. Defendants argue in their motion to dismiss that plaintiff, a municipal taxpayer purporting to sue "[o]n behalf of Allegheny County," lacks standing to assert his antitrust claims. The court agrees with defendants and will dismiss plaintiff's suit for lack of standing for the reasons set forth below.

Facts Accepted As True For Purposes of Deciding the Motion

In deciding defendants' motion to dismiss for lack of standing, the merits of plaintiff's substantive claims are not at issue. *Warth v. Selden*, 422 U.S. 490, 500 (1975). Rather, the court will focus on those facts relevant to whether plaintiff has alleged "a personal stake in the action to warrant his invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on his behalf." Id. at 498-99. The facts forming the basis of plaintiff's relationship to the underlying claims are scant. Plaintiff alleges he is "an individual and taxpayer" who lives in Pittsburgh, Pennsylvania. Pl.'s Compl. ¶ 1. Plaintiff purports to bring the action "on behalf of Allegheny County" against "the NFL and all of its member teams for ongoing violations" of federal antitrust laws. Id. ¶ 58. Plaintiff does not allege that he is a prospective professional football owner, or that he is even a consumer of defendants' product.

Plaintiff alleges that the NFL and its member teams have created a system in which demand for NFL franchises remains higher than the number of regions actually awarded franchises. Id. ¶ 8. In effect, plaintiff argues that the system created by the NFL is one of "franchise free agency." Id. Plaintiff contends that the NFL and its member teams exploit this system in order to apply

leverage to the cities, regions and states of existing NFL teams to obtain taxpayer subsidies for the construction of new stadiums. Id. According to plaintiff, the NFL and the Steelers utilized the existing system — and, in the process violated federal antitrust laws — by forcing Allegheny County to construct Heinz Field for the Steelers on extremely favorable lease terms.

The crux of plaintiffs claims are as follows:

> The citizens of Allegheny County were willing to build a new stadium for the Pittsburgh Steelers and agree to lease terms that allowed the franchise to field a competitive team while remaining profitable. Allegheny County residents never intended, however, to spend tax dollars merely to increase the Steelers' profits or to increase the franchise value. Yet, the cumulative effect of the NFL's antitrust violations forced Allegheny County to pay money far more [sic] to build Heinz Field and to agree to more onerous lease terms to keep the Steelers in Pittsburgh than a marketplace free of these trade restraints would have demanded. Execution of the lease required consent by the National Football League.

Id. ¶ 64. According to plaintiff, the Steelers' lease terms provide that the team does not pay an annual base rent, that the team receives nearly all of the new revenue from Heinz Field, and that the Sports & Exhibition Authority of the City of Pittsburgh and Allegheny County (the "Sports & Exhibition Authority") will be responsible for capital repairs and future expenditures at Heinz Field. Id. ¶¶ 57-60.

With respect to defendants' alleged antitrust violations, plaintiff requests the court to award the following relief:

(1) declare that the Heinz Field Stadium lease is voidable at Allegheny County's discretion; (2) grant compensatory and punitive damages to Allegheny County in excess of $200 million dollars against the NFL and its member teams, trebling such damages if the court finds that defendants violated the Sherman Antitrust Act and the Clayton Act; (3) order plaintiff attorney fees and litigation costs; and (4) order other relief as the court deems just. Id.

Defendants filed their motion to dismiss arguing that plaintiff lacks standing to pursue his claims. Defendants contend that plaintiff cannot satisfy the constitutional requirements of standing encompassed in Article III of the United States Constitution solely on the basis that he is a municipal taxpayer. Defendants further assert that even if plaintiff alleged sufficient evidence to satisfy Article III standing requirements, plaintiff would be barred from pursuing his claims based upon prudential limitations to standing because plaintiff's claims amount to (1) a generalized grievance shared by all Allegheny County taxpayers and/or (2) an attempt to assert the legal rights of a third party. The parties requested oral argument, and a hearing on defendant's motion to dismiss was held on October 8, 2004. At that time, plaintiff filed with the court letters from Allegheny County and the Sports & Exhibition Authority which stated that neither entity wanted to join plaintiff's suit against defendants. See Doc. No. 15.

Standard of Review

A motion to dismiss tests the legal sufficiency of the complaint. *Kost v. Kozakiewicz*, 1 F.3d 176, 183 (3d Cir. 1993). In deciding a motion to dismiss the court is not opining on whether the plaintiff will be likely to prevail on the merits. Rather, when considering a motion

to dismiss, the court accepts as true all factual allegations in the complaint and views them in a light most favorable to the plaintiff. *U.S. Express Lines Ltd. v. Higgins*, 281 F.3d 383, 388 (3d Cir. 2002). The pleader is required to "set forth sufficient information to outline the elements of his claim or to permit inferences to be drawn that these elements exist." *Kost*, 1 F.3d at 183 (citing *5A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE* § 1357 (2d ed. 1990)).

When a motion to dismiss is brought on the basis that a party lacks standing, that party bears the burden of proving the requisite standing to pursue his or her claim. *ACLU-NJ v. Township of Wall*, 246 F.3d 258, 261 (3d Cir. 2001). For purposes of determining whether the party alleged sufficient facts to survive a motion to dismiss for lack of standing, the court must accept as true all material allegations set forth in plaintiff's complaint and must construe those facts in favor of the plaintiffs. *Storino v. Borough of Point Pleasant Beach*, 322 F.3d 293, 296 (3d Cir. 2003). The court retains the power to allow or to request the plaintiff to provide additional information — through amending the complaint or submitting affidavits alleging particularized facts — in support of the plaintiffs standing. *Warth*, 522 U.S. at 501-02. The district court may also hold an evidentiary hearing to determine standing. *In re Zettlemeyer*, 53 F.3d 24, 27 (3d Cir. 1995). If, however, "after this opportunity, the plaintiffs standing does not adequately appear from all materials of record, the complaint must be dismissed." Id. at 502.

Analysis

I. Standing Generally

The doctrine of standing "asks whether a litigant is

entitled to have a federal court resolve his [or her] "grievance." *Kowalski v. Tesmer*, 543 U.S. — (2004). Standing is based upon both constitutional and prudential components, and a challenge to a plaintiffs standing in federal court requires the court to examine whether the plaintiff has a personal stake in the action that warrants the invocation of federal court jurisdiction. *Warth*, 422 U.S. at 498-99. The constitutional requirements for standing ensure that a plaintiff has an actual "case or controversy" pursuant to the justiciability demands of Article III. Id. at 498. In order to meet these requirements, the plaintiff must allege a sufficient injury in fact, fairly traceable to the actions of the defendant, that can be redressed by the courts. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The injury must be concrete and particularized, as well as "actual or imminent, not conjectural or hypothetical." Id. (internal quotations and citations omitted). The causation prong requires that the injury be "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Bennett v. Spear*, 520 U.S. 154, 167 (1997). Finally, redressability examines whether the relief sought, if granted by the court, will likely alleviate the particularized injury alleged by the plaintiff. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982). Taken together, these three elements comprise the "irreducible constitutional minim[a] of standing." *Lujan*, 504 U.S. at 560.

In addition to the constitutional requirements for standing, federal courts also place prudential limitations on the right of a party to maintain an action. These prudential limitations have been referred to as "matters of judicial self-governance" that are necessary to prevent the courts from deciding abstract questions where other

government institutions might be more competent and where "judicial intervention may be unnecessary to protect individual rights." *Warth*, 422 U.S. at 499-500. As stated by the United States Court of Appeals for the Third Circuit: "Prudential considerations constitute a supplemental aspect of the basic standing analysis and address concerns regarding the need for judicial restraint." *Oxford Associates v. Waste System Authority*, 271 F.3d 140 (3d Cir. 2001). The court of appeals further stated that these prudential standing considerations require:

> (1) a litigant assert his [or her] own legal interests rather than those of third parties, (2) courts refrain from adjudicating abstract questions of wide public significance which amount to generalized grievances, and (3) a litigant demonstrate that her interests are arguably within the zone of interests intended to be protected by the statute, rule or constitutional provision on which the claim is based.

Id. *(Quoting Davis by Davis v. Philadelphia Housing Authority*, 121 F.3d 92, 96 (3d Cir. 1997)).[21]

II. Municipal Taxpayer Standing

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[21] Prudential barriers to standing may be abrogated by Congress. Warth, 422 U.S. at 501. As long as constitutional standing requirements are met, "persons to whom Congress has granted a right of action, either expressly or by clear implication, may have standing to seek relief on the basis of the legal rights and interests of others, or indeed, may invoke the general public interest in support of their claim." Id. Congressional abrogation of a prudential barrier to standing is not at issue in the present case.

A. In General

One way in which litigants have attempted to achieve standing in federal court is through their status as municipal taxpayers. If standing is "one of the most amorphous [concepts] in the entire domain of the public law," *Flast v. Cohen*, 392 U.S. 83, 99 (1968), nowhere is this better demonstrated than in the area of municipal taxpayer standing. The doctrine of municipal taxpayer standing suggests that, under limited circumstances, a municipal taxpayer may have a sufficient connection to assert a claim based solely upon the litigant's status as a municipal resident and taxpayer. *Rocks v. City of Philadelphia*, 868 F.2d 644, 648 (3d Cir. 1989). The genesis for municipal taxpayer standing lies in the seminal United States Supreme Court decision in *Frothingham v. Mellon*, 262 U.S. 447 (1923). In that opinion, the Supreme Court determined that the plaintiff's status as a federal taxpayer was insufficient to confer standing to challenge a federal appropriations bill. In effect, the taxpayer's claim amounted to a generalized grievance to have an act of Congress declared unconstitutional. Id. at 488-89.

The court in dicta, however, recognized "the rule" that "resident taxpayers may sue to enjoin an illegal use of the moneys of a municipal corporation." Id. at 486 (emphasis added). The court further reasoned:

> The interest of a taxpayer of a municipality in the application of its moneys is direct and immediate and the remedy by injunction to prevent their misuse is not inappropriate. It is upheld by a large number of state cases and is the rule of this court. Nevertheless, there are decisions to the contrary. The reasons which support the extension of the equitable remedy to a single

> taxpayer in such cases are based upon the peculiar relation of the corporate taxpayer to the corporation, which is not without some resemblance to that subsisting between stockholder and private corporation.

Id. at 486-87 (citations omitted) (emphasis added). The court stated that the relationship of a federal taxpayer to the federal government was different because:

> His interest in the moneys of the treasury — partly realized from taxation and partly from other sources — is shared with millions of others, is comparatively minute and indeterminable, and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity."

Id. (emphasis added).

The Court in *Frothingham* cited an earlier decision, *Crampton v. Zabriski*, 101 U.S. 601 (1879), in support of its conclusion that, on some occasions, a municipal taxpayer may have standing to obtain equitable relief from a municipal corporation.[22] In

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[22] Each time the Court in Frothingham discussed either federal taxpayer or municipal standing, the Court described the nature of relief as an equitable remedy against a government body or official. Plaintiff in the present case does not ask solely for equitable relief against Allegheny County. Indeed, no relief is sought against the municipal corporation. Rather, plaintiff requests a declaratory judgment that the stadium lease is voidable at the county's discretion, as well as for compensatory and punitive damages to be awarded to the county for defendants' purported antitrust violations. Plaintiff also requests, "other relief as the court deems just." As noted, however, Allegheny County is not a defendant in this case. For further discussion, see part III of this opinion, *infra*.

Crampton, the board of freeholders of Hudson County, New Jersey, adopted a resolution to purchase certain lots of land in Jersey City to build a courthouse. The board purchased the land and issued bonds to pay the owner of the land. County taxpayers brought suit to compel the board to reconvey the land and for the owner of the land to reconvey the bonds, and to enjoin the owner's pending suit to enforce payment. The Court stated the following with respect to whether the litigants could continue their suit:

> Of the right of resident taxpayers to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of the county or the illegal creation of a debt which they in common with other property-holders of the county may otherwise be compelled to pay, there is at this day no serious question. The right has been recognized by the State courts in numerous cases; and from the nature of the powers exercised by municipal corporations, the great danger of their abuse and the necessity of prompt action to prevent irremediable injuries, it would seem eminently proper for courts of equity to interfere upon the application of the taxpayers of a county to prevent the consummation of a wrong, when the officers of those corporations assume, in excess of their powers, to create burdens upon property-holders.

Crampton, 101 U.S. at 609.

Crampton and *Frothingham* suggest at a minimum that a party may only assert municipal

taxpayer standing if the party is (1) suing a governmental entity or representative; and (2) requesting equitable relief. Subsequent decisions have reaffirmed these dual requirements. See *Doremus v. Board of Education*, 342 U.S. 429, 433-34 (1952) (noting the "remedy by taxpayer's action to restrain unconstitutional acts which result in direct pecuniary injury"); *Lynch v. Donnelly*, 465 U.S. 668 (1984) (suit brought to enjoin municipal expenditures in violation of First Amendment Establishment Clause); *Rocks v. City of Philadelphia*, 868 F.2d at 648 (action to enjoin city from increasing the percentage of minority-owned businesses to be awarded bids in a city construction project under the equal protection clause); *United States. v. City of New York*, 972 F.2d 464 (2d Cir. 1992) (equity action brought by municipal taxpayer to void city contracts); *Cammack v. Waihee*, 932 F.2d 765 (9th Cir. 1991) (suit brought for declaratory relief against State of Hawaii and City of Honolulu challenging constitutionality of Good Friday as an official holiday); *Hawley v. City of Cleveland*, 773 F.2d 736, 741 (6th Cir. 1985) (suit brought to enjoin municipality from renting space to Catholic diocese for less than market value under First Amendment Establishment Clause).[23]

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[23] Defendants further suggest that municipal taxpayer standing is only available in situations where a party brings suit for a *constitutional violation*. The opinions cited by defendants appear to support this general proposition. *See e.g., Rocks, supra.* In fact, in some of the opinions courts have explicitly framed the standing requirement as requiring an unconstitutional action. *See Freedom from Religion Foundation v. Zielke*, 845 F.2d 1463, 1470 (7th Cir. 1988) ("[A] litigant may have standing as a municipal taxpayer to challenge *unconstitutional* acts that affect public finances....") (emphasis added); *Hawley v. City of Cleveland*, 773 F.3d 736, 742 (6th Cir. 1985) (Supreme Court allows suits by local taxpayers "to *enjoin unconstitutional acts* affecting public finances.") (emphasis added). Furthermore, in an extensive study, Professor Nancy Staudt concluded that the courts "are *uniformly* resistant to municipal taxpayer suits

B. Article III Limitations and Prudential Considerations

It is unclear whether municipal taxpayer standing is governed by Article III considerations or prudential considerations. The Court in *Frothingham* commented on the fact that federal taxpayers did not have a sufficient injury to bring suit, suggesting that the focus was on Article III limitations to standing. In *Flast v. Cohen*, 392 U.S. 83, 92-93 (1968), however, the Court stated that *Frothingham* could be read as either an Article III or a prudential barrier to standing. *Cohen* suggests that taxpayer standing is a form of Article III standing with a particular focus on the injury and redressibility prongs of that analysis. Id. at 106. The Court in *Cohen*, however, discussed policy considerations in an attempt to differentiate the facts described in that decision from those in *Frothingham*. Id. at 105-06. Regarding the confusion, the Court remarked: "The 'many subtle pressures' which cause policy considerations to blend into the constitutional limitations of Article III make the justiciability doctrine one of uncertain and shilling contours." Id. at 97.

The United States Court of Appeals for the Third Circuit views the determination of whether a municipal taxpayer has a sufficient stake in the proceedings to invoke the court's jurisdiction as a prudential standing consideration. *Rocks v. City of Philadelphia*, 868 F.2d 644 (3d Cir. 1989). In *Rocks*, municipal taxpayers challenged the constitutionality of minority business

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alleging federal statutory violations." Nancy C. Staudt, *Taxpayers in Court*, *52* EMORY L.J. 771, 883 & n.306 (2003) (collecting cases) (emphasis added). The court, however, declines to add this element to municipal taxpayer standing at this time, especially since the suit in Crampton did not involve a constitutional challenge to the municipality's actions. Crampton, 101 U.S. at 608.

enterprise participation requirements applied to a city construction project. The appellants argued that the city's actions to increase the percentage of minority-owned businesses in a bid specification for the city project were unconstitutional. The district court dismissed the complaint for lack of standing.

On appeal, the court of appeals recognized the Article III right of the appellants to bring suit against the city to enjoin an allegedly unconstitutional governmental action. Id. at 648. The court of appeals, however, stated that it also had to examine "whether these particular appellants satisfy the prudential requirements as well." Id. Specifically, the court of appeals examined "whether these appellants have sustained a proximate, individual, and addressable injury, based solely upon their status as municipal residents and taxpayers." Id.. (emphasis added). The court of appeals determined that the appellants failed to meet prudential requirements for standing because they were taxpayers solely resting their claim of relief on the rights and interests of a third party, and that the entity most likely to have suffered injury — business contractors or construction workers — did not join the complaint. In that respect, the court stated that the appellants were asserting a "generalized grievance" that might have been "shared in substantially equal measure by all or a large class of citizens." Id.. at 649. *See also Storino v. Borough of Point Pleasant Beach*, 322 F.2d 293, 298 n.2 (3d Cir. 2003) (court of appeals denied standing to the plaintiffs on the basis of their status of taxpayers, finding that their suit amounted to a generalized grievance and stating that "the only acknowledged exception to this rule arises when a plaintiff challenges a government expenditure as violating the establishment clause.").

III. Plaintiff Does Not Have Standing

Whether a litigant has standing "often turns on the nature and source of the claim asserted." *Warth v. Seldin*, 422 U.S. at 500. The United States Supreme Court directed lower courts "to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated." *Cohen*, 392 U.S. at 102. In this case, plaintiff brought suit on the basis of his status as a citizen and taxpayer of Allegheny County. Pl.'s Compl. ¶ 2. Plaintiff asserts that private entities violated federal statutory antitrust laws in a manner that deceived county and municipal leaders and forced Allegheny County and the Sports & Exhibition Authority to enter into unconscionable lease terms with the Steelers, whereby the Steelers illegally received revenue generated by Heinz Field that plaintiff contends should be reserved to the public fisc. Id. ¶¶ 58-60, 64. Plaintiff requests defendants to pay Allegheny County treble damages for the alleged antitrust violations, and further requests the court to allow Allegheny County to void the Heinz Field lease at its discretion. The only relief plaintiff seeks to recover on his own behalf are attorney fees and litigation costs.

Under these factual circumstances, plaintiff is essentially bringing derivative claims on behalf of Allegheny County and the Sports & Exhibition Authority. Plaintiff does not allege he was injured in any way by Allegheny County or the Sports & Exhibition Authority. In fact, plaintiff alleges that he and the other taxpayers of Allegheny County were "willing to build a new football stadium" for the Steelers and "to agree to lease terms that allowed the franchise to field a competitive team while remaining profitable." Id.. ¶ 64. Plaintiff contends, however, that defendants' actions "forced" Allegheny County to pay far more tax revenue than what

the taxpayers, himself included, expected to contribute toward the Steelers becoming "a competitive team while remaining profitable." Id.. Thus, under the allegations in plaintiff's complaint, Allegheny County and the Sports & Exhibition Authority are characterized as victims beholden to defendants in order to keep the Steelers in Pittsburgh.[24]

Plaintiff's allegations, taken as true for purposes of defendants' motion to dismiss, do not give rise to standing in this case. The court will assume for purposes of defendants' motion that plaintiff alleged a sufficient "injury," i.e., that plaintiffs tax dollars were improperly expended on the disputed practice. *See Rocks*, 868 F.2d at 648 (determining without discussion municipal taxpayers suffered a sufficient injury under Article III); *see also United States v. New York*, 972 F.2d 464, 470 (2d Cir. 1992) ("we presume a municipal taxpayer's relationship to the municipality is 'direct and immediate' such that the taxpayer suffers concrete injury whenever the 'challenged activity involves a measurable appropriation or loss of revenue."); *Cammack v. Waihee*, 932 F.2d 765, 770-71 (9th Cir. 1991) ("municipal taxpayer standing simply requires the 'injury' of an allegedly improper expenditure of municipal funds"); *District of Columbia Common Cause v. District of Columbia*, 858 F.2d 1, 5 (D.C. Cir. 1988) ("[w]hen a municipal taxpayer can establish that the challenged activity involves a

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[24] Interestingly, however, now that Allegheny County and the Sports & Exhibition Authority have decided not to join plaintiff's case, see Doe. No. 15, plaintiff states that Allegheny County and the Sports & Exhibition Authority have joined into an "unholy alliance" with defendants. Pl.'s Br. (Doe. No. 14 at 14). Neither Allegheny County nor the Sports & Exhibition Authority are defendants to this action.

measurable appropriation or loss of revenue, the injury requirement is satisfied.").[25] The court also accepts for purposes of the motion to dismiss that plaintiff's injury could be redressed by a favorable decision finding that the stadium lease was voidable at Allegheny County's discretion. *Cammack*, 932 F.2d at 772 (injunction ceasing government's expenditure on disputed practice sufficient to redress plaintiffs injury). Plaintiff does not have to demonstrate that his taxes will be reduced as a result of a favorable judgment. See *District of Columbia Common Cause*, 858 F.2d at 5 ("[b]y enjoining an illegal expenditure, the court can redress the taxpayer's injury caused by the misuse of public funds and ensure that the funds will be devoted to lawful purposes of possible

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[25] The court "assumes" that plaintiff has suffered the requisite injury only because the proceedings are at the motion to dismiss stage. Plaintiff directs the court's attention to paragraphs *54-57* in his complaint in an attempt to demonstrate a sufficient "injury" for purposes of establishing standing. The court notes that at this stage in the proceedings, plaintiff's allegations are sufficient to establish a sufficient injury under existing decisional law. Plaintiff did allege that tax money has been funneled to the Steelers as a result of defendants' disputed conduct. Pl.'s Compl. ¶ 64. Plaintiffs allegations, however, for the most part, are devoted toward speculative future injuries county taxpayers might incur, such as: (1) possible major repairs and improvements over the life of the 30-year stadium lease; (2) the possibility that the Steelers might not contribute $2.9 million annually to the stadium's capital reserve fund starting in 2017; and (3) the fact that the Steelers' lease "provides no guaranty" that the Sports & Exhibition Authority will receive sufficient revenue to fund its $650,000 annual obligation to the stadium reserve fund. In this regard, plaintiff might have difficulty demonstrating a sufficient "concrete and particularized" injury that is "actual or imminent" were this case to proceed. Lujan, 504 U.S. at 561 (because standing is not a mere pleading requirement "but rather an indispensable part of the plaintiffs case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation.").

benefit to the taxpayers.").

The court, however, cannot find that plaintiff's injury is "fairly traceable to the conduct" of defendants. *Allen v. Wright*, 468 U.S. 737, 757 (1984).[26] Plaintiff's injury, as demonstrated above, is that his tax dollars are allegedly being improperly spent on a disputed practice. Plaintiff in effect alleges that defendants committed an antitrust violation that caused Allegheny County to spend tax dollars in order to keep the Steelers in Pittsburgh. In this respect, however, plaintiff's theory is missing a critical link in the chain of causation. Defendants are not the entity that allegedly improperly distributed plaintiff's tax dollars. Defendants are not a municipal or state body, they do not have any characteristics of such an entity, and they certainly do not have the ability to levy and collect taxes from the citizens of Allegheny County. While the standing doctrine may be an elastic concept, extending the doctrine to fit plaintiff's theory would stretch standing beyond the breaking point.

If plaintiff's theory was accepted by this court, any

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[26] The Supreme Court noted that the "fairly traceable" and "redressability" requirements are identical in situations where the relief requested by the litigant is simply the cessation of the allegedly illegal conduct. Allen, 468 U.S. at 759 n.24. Plaintiff's complaint in this case requests relief beyond the cessation of allegedly illegal conduct. Here, plaintiff requests upwards of $600 million in damages to be awarded presumably to Allegheny County for defendants' allegedly illegal conduct. In this situation where the "relief requested goes well beyond the violation of law alleged," the court is required to address the "fairly traceable" and "redressability" prongs independently. Id. at 753 n. 19. According to the Supreme Court, the "fairly traceable" prong "examines the causal connection between the assertedly *unlawful conduct* and the *alleged injury*," while the "redressability" prong "examines the causal connection between the *alleged injury* and *the judicial* relief requested." Id. (emphasis added).

municipal taxpayer could bring suit against any private entity that receives tax dollars from a local government by arguing that the entity violated federal law. Federal courts could be flooded with a litany of claims by municipal taxpayers seeking to sue private entities as long as the litigant could successfully allege a nexus between a violation of federal law and the entity's receipt of municipal tax dollars. This outcome, however, would run anathema to the constitutional standing requirement that the injury alleged be "fairly traceable" to the actions of the defendant(s). In such cases, and in the present case where plaintiff's suit was brought to redress the allegedly improper distribution of local tax dollars to private entities, the missing link is that the litigant, while disputing the judgment of the local government entity, did not sue the local government entity that actually made the tax distribution. As a result, plaintiff cannot satisfy the causation prong because his alleged injury is not "fairly traceable" to the conduct of defendants, but rather "results from the independent action of some third party not before the court." Allen, 468 U.S. at 757.[27]

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[27] Even if Allegheny County was a party to the lawsuit, plaintiff would have difficulty meeting the more demanding requirements of antitrust standing. These requirements are summarized in the authoritative antitrust treatise as requiring plaintiff to show:

> (1) that the acts violating the antitrust laws caused — or in an equity case, threatened to cause — the private plaintiff injury in fact to its "business or property;" (2) that this injury is not too remote or duplicative of the recovery of a more directly injured person; (3) that such injury is "antitrust injury," which is defined as the kind of injury that the antitrust laws were intended to prevent and "flows from that which makes defendants' acts unlawful;" and, in a damage case, (4) that the damages claimed or awarded measure such injury in a reasonably quantifiable way.

Plaintiff's suit fails under the prudential limitations of the municipal taxpayer doctrine as well. Every opinion reviewed with respect to municipal taxpayer standing, including those cited by the United States District Court for the Southern District of Ohio in *Ohio ex rel. Davis v. National Football League*, Civ. No. 1:03-CV-00355, slip. op. (S.D. Ohio filed Feb. 9, 2004), examine the twin requirements that (1) the litigant sue a government entity and (2) request equitable relief. See, supra, at 10.[28]

II PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW § 335a (2d ed. 2000). See In re *Lower Lake Erie Iron Ore Antitrust Lit.*, 998 F.2d 1144, 1165-66 (3d Cir. 1993) (citing *Associated General Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983)). *In this case*, plaintiff has not alleged any facts that his "business or property" was injured as a result of a violation of antitrust laws. As indicated above, he does not allege any other connection with defendants other than the fact that he pays taxes to Allegheny County which entered into a lease relationship with defendants. According to Areeda and Hovenkamp: "The courts have correctly refused to allow treble damage actions by a taxpaying property owner or citizen against defendants whose alleged antitrust violation injured the municipalities in which the plaintiff lived." *AREEDA & HOVENKAMP, ANTITRUST LAW* § 353b. Furthermore, there is a more "direct victim of the alleged antitrust violation" and there would be a "potential for duplicatative recovery or complex apportionment of damages" were plaintiff's suit to be successful. In re *Lower Lake Erie*, 998 F.2d at 1165. Allegheny County is the entity that has allegedly been injured by defendants' conduct, and the county could possibly (although it chose not to join plaintiff's case) bring suit against defendants as well. Finally, Areeda and Hovenkamp address plaintiffs "unholy alliance" argument by stating that standing "should be denied to the private plaintiff who alleges that the [local government's] judgment was contaminated by 'political influence,' bribery, membership in a conspiracy or the like." *AREEDA & HOVENKAMP, ANTITRUST LAW* § 353b.

[28] In Davis, a municipal taxpayer in Cincinnati brought suit against the National Football League and its member clubs and asserted claims similar to those made by plaintiff in this case. In that decision, the district court determined that the plaintiff had standing under the doctrine of municipal taxpayer standing to pursue her antitrust claims against the defendants. During oral argument in the

Plaintiff's claims clearly do not meet the first requirement as no government entity has been sued. As to the second requirement, plaintiff is suing for more than equitable relief. Plaintiff is seeking millions of dollars in antitrust damages from thirty-three private entities — not for himself, but for the county which has declined to participate in this litigation. The court respectfully disagrees with the rationale of the district court in *Davis* that the doctrine of municipal taxpayer standing should be extended under these factual circumstances. The lesson of *Frothingham* and subsequent decisions addressing municipal taxpayer standing is that, because of the "peculiar relation of the taxpayer to the [municipal] corporation," the taxpayer is entitled to bring suit for an injunction against a local government entity to challenge unlawful municipal expenditures. 262 U.S. at 486-487. That relationship does not extend to permit municipal taxpayers to sue private defendants that receive government funds and to challenge the allegedly illegal actions of those private defendants.

Additionally, plaintiff failed to allege any connection with defendants beyond his status as a municipal taxpayer. Rocks suggests that plaintiff is required to establish more than an injury received "solely" on his status as a municipal taxpayer in order to overcome prudential standing limitations. Otherwise, according to the court of appeals, plaintiff's complaint amounts to a "generalized grievance" that may be "shared in substantially equal measure by all or a large class of

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present matter, counsel for defendants informed the court that the district court in Ohio granted a motion to amend the complaint to substitute the commissioners of Hamilton County, Ohio, as plaintiffs. According to the representation of defendants, the plaintiffs in Davis no longer rely upon municipal taxpayers standing.

citizens." Here, plaintiff alleges no facts connecting him to defendants other than the fact that he is a taxpayer of Allegheny County. In fact, plaintiffs counsel reinforced during oral argument that plaintiffs only connection to the suit was that he is a municipal taxpayer. *See* Transcript of Proceedings on October 8, 2004 ("Tr.") at 15. ("Mr. Warnock is standing as a taxpayer[.]"). This concession by plaintiffs counsel permits this court to conclude that there is no need for additional information in support of plaintiffs standing or a need for an evidentiary hearing to determine standing. The standing on which plaintiff is relying relates solely to his status as a municipal taxpayer.

Plaintiff's final possible basis for standing is third party standing. The rule prohibiting litigants from asserting the rights of third parties is not absolute. Kowalski, 543 U.S. at —. Under limited circumstances a litigant may bring an action on behalf of a third party where the following three criteria are met: (1) the litigant suffered an injury in fact giving him or her a sufficiently concrete interest in the outcome of the issue; (2) the litigant has a close relationship to the third party; and (3) there exists some hindrance to the third party's ability to protect his own interests. Id.[29] In this case, plaintiff does not allege a special relationship (such as an attorney-client relationship, *see Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989), or a doctor-patient relationship, *see Griswold v. Connecticut*, 381 U.S. 479 (1965)) with Allegheny County. Neither does plaintiff

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[29] The United States Supreme Court indicated, however, that third party standing has generally been granted in only two types of cases: (1) First Amendment cases; and (2) cases "to litigate the rights of third parties when enforcement of the challenged restriction *against the litigant* would result indirectly in violation of third parties' rights." Id. (emphasis in original) (citing Warth, at 422 U.S. at 510).

allege in his complaint or submissions to this court that Allegheny County is unable to assert its own rights in this case. In fact, as stated above, Allegheny County and the Sports & Exhibition Authority sent letters to plaintiff stating that neither entity wanted to join plaintiff's suit against defendants. *See* Doc. No. 15.

Plaintiff failed to allege sufficient facts upon which this court can find that he has standing to pursue his claims. Plaintiff does not have standing under the constitutional standing requirements of Article III of the United States Constitution. Alternatively, plaintiff is unable to overcome prudential barriers to standing with respect to his claims. In football terms, plaintiff is like a spectator in the stands who is unable to challenge a disputed call by the referee because he does not hold the head coach's red challenge flag. Accordingly, plaintiff's complaint will be dismissed for lack of standing.

Conclusion

AND NOW, this 9th day of February 2005, upon consideration of the motion by defendants National Football League and its member clubs (the "NFL"), including Pittsburgh Steelers Sports, Inc. (the "Steelers"), and Philadelphia Eagles Limited Partnership (the "Eagles") (collectively referred to as "defendants"), to dismiss the complaint of plaintiff Robert C. Warnock ("plaintiff or "Warnock") for lack of standing (Doc. No. 5), IT IS ORDERED that defendant's motion is GRANTED. The clerk shall mark this case closed.

By the court:

/s/ Joy Flowers Conti

Joy Flowers Conti

United States District Judge

cc: William James Helzlsouer
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No. 04-3919

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

In re: NATIONAL FOOTBALL LEAGUE; CINCINNATI BENGALS, INC.; CLEVELAND BROWNS LLC; SAN FRANCISCO 49ERS, LTD., Petitioners,

Before: KENNEDY, SUHRHEINRICH, and CLAY, Circuit Judges.

The petitioners, the National Football League and three member clubs (collectively referred to as the "NFL"), seek a writ of mandamus directing the district court to dismiss for lack of jurisdiction an action now pending against them — Hamilton County Board of Comm'r v. National Football League, et al., No. 03-CV-355 (S. D. Ohio). On September 20, 2004, the court directed responses to the petition, and a response has now been filed by the Hamilton County Board of Commissioners ("Hamilton County") and by the prior plaintiff, Carrie Davis. The NFL has filed a reply in support of the petition and moves for a stay of proceedings in the district court pending this court's consideration of the petition for a writ of mandamus. Hamilton County opposes the motion for a stay.

"The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations where the petitioner can show a clear and indisputable right to the relief sought." In re American President Lines, Ltd., 929 F.2d 226, 227 (6th Cir. 1991) (order). Mandamus review generally is confined to matters of usurpation of judicial power or clear abuse of discretion. Schlagenhauf v. Holder, 379 U.S. 104, 111 (1964). Upon review of all of